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SUPREME COURT, U.S.

No. 98-468

In The

Supreme Court of the United States

October Term, 1998

DUANE MONTGOMERY,

Petitioner,

vs.

CITY OF FARMINGTON HILLS;
FARMINGTON HILLS POLICE DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court should deny the petition because the appellate court properly granted a dismissal based on the lack of jurisdiction for the reason that the Petitioner did not appeal from the final order?

II. Whether this Court should deny the petition because the trial court properly granted the motion to set aside a default?

III. Whether this Court should deny the petition because the trial court properly concluded that summary judgment would be granted to that Defendant because the Farmington Hills Police Department is not an entity subject to suit?

IV. Whether this Court should deny the petition because the trial court properly concluded that no constitutional violation had occurred and the Petitioner's lawful arrest was based on probable cause?

V. Whether this Court should deny the petition because the issue of constitutionality was not raised below, and furthermore, the state abandonment statute is constitutional?

VI. Whether this Court should deny the petition because Petitioner's denial of medical treatment is also frivolous where videotapes and records show that Petitioner was taken to the hospital where he received medical treatment?

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OPINIONS BELOW

Respondent protests that this Court should consider the *final* Opinion and Order for the trial court dated August 11, 1998 because this Opinion and Order was never within the appellate court jurisdiction because at the time Petitioner filed the appeal relating to the Default, the final Opinion and Order had not yet been issued overturned.

JURISDICTIONAL GROUNDS

Respondents accept the jurisdictional statement as set forth in the Petition except to the extent that any conflict exists in this Court or in the decisions of the Circuit Court of Appeals. In fact, *all* circuit courts are consistent with the court rules requiring a final order *before* the jurisdiction of *any* appellate court can be invoked.

STANDARD OF REVIEW

> Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of informing the court of the basis for his or her motion. *See Celotex Corp. v. Catrett*, 447 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The movant must demonstrate either the absence of a genuine issue of fact of the absence of evidence supporting the nonmoving party's case. *See Id.* at 325, 106 S. Ct. at 2554. Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S. Ct. at 2552. The substantive law

identifies which facts are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 91 L. Ed. 2d 202 (1986). "The district court is not to make credibility determinations or weigh the evidence" upon a motion for summary judgment. *Adams v. Metiva*, 31 F.3d 375, 384 (CA 6, 1994) (citing *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513).

When determining whether there is a genuine issue for trial, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962); accord *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). "Although [the nonmoving party] is entitled to a review of the evidence in the light most favorable to him or her, the nonmoving party is required to do more than simply show that there is some 'metaphysical doubt as to the material facts.' " *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (CA 6, 1994) (quoting *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356). Rule 56(e), "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that thee is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553 (quoting Rule 56(e)). "The mere existence of a scintilla of evidence in support of the Petitioner's position will be insufficient; there must be evidence on which the jury could reasonably find for the Petitioner." *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512. (RE 93, Opinion and Order dated 8/11/98, pp. 4-6).

STATEMENT OF THE FACTS AND PROCEEDINGS

A. Facts of the Underlying Matter.

The April 13, 1996, Incident

On Saturday, April 13, 1996, at approximately 2:30 p.m., Farmington Hills Police Officer Zimmer[1] observed the Petitioner driving on Farmington Road in the City of Farmington Hills at a higher than posted rate of speed. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh. 2, Zimmer's Police Report). The radar mounted in Zimmer's patrol vehicle clocked Petitioner's car traveling at a rate of 56 mph in the 40 mph zone. Officer Zimmer initiated a traffic stop to investigate the driver for speeding, which was videotaped and provided to the trial court in the Summary Judgment Motion (RE 52, Plaintiff's Motion for Summary Judgment).

Officer Zimmer approached the vehicle on its passenger-side and asked Petitioner, the lone occupant and driver of the car, to produce his driver's license and the vehicle's registration and insurance. Petitioner was immediately agitated and uncooperative. He produced his driver's license, but not the registration or insurance. Petitioner adamantly denied that he was speeding when Officer Zimmer told him the reason for the stop. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report)

During this roadside questioning, Officer Zimmer observed, in plain view, a large fanny pack buckled around the Petitioner's waist. Officer Zimmer recognized the pack as the sort used by police officers to carry their weapons while off-duty. Upon making this observation, Zimmer asked Petitioner if he had a gun. Although the police eventually recovered two fully loaded weapons and 21 rounds of ammunition from the Petitioner's person, he initially

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1. Officer Zimmer has, since April 13, 1996, married and her new name is Vaughan. However, she will be referred to throughout this brief as Officer Zimmer. (Exh 2).

refused to answer the question. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report).

Upon further roadside questioning, Petitioner admitted that he was armed and claimed to work for "the state", but refused to acknowledge whether he was a police officer. In Petitioner's Appendix page A-25, the investigating officer, Mr. Tigerman, learned that the State disavowed any knowledge of Petitioner, Detroit Edison refused to respond, and the "registered" owner of the vehicle could not be reached. Yet, Petitioner continued to argue with Zimmer about the propriety of the traffic stop and the validity of Zimmer's radar reading. Petitioner insinuated that the true reason that he was stopped was his race, as Petitioner is an African American. Fearing for her safety in dealing with the armed, agitated and uncooperative suspect, Officer Zimmer called for backup. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report). While waiting for her backup, Officer Zimmer asked the Petitioner several times to turn off his car. Petitioner ignored each order and continued to argue with Zimmer. Petitioner refused to say whether he possessed a concealed weapons permit, made a veiled reference to the notorious Rodney King case and threatened to file a complaint against Zimmer. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report).

Petitioner's request to speak with Zimmer's supervisor was fortuitously honored when Farmington Hills Police Sergeant Summers arrived, along with Farmington Hills Police Officer Woodmore, to serve as Zimmer's backup. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 4, Summers' Police Report). Sgt. Summers approached the idling vehicle and observed Petitioner in the driver's seat with one hand on the steering wheel and the other on the stick shift. Having been informed by Zimmer that Petitioner was armed, Summers asked if it was true. Petitioner's response was, "I'm not required to answer that question." Petitioner ignored Summers' order to shut off and/or exit the car and refused to tell Summers whether he was a police

officer. The situation escalated briefly as Petitioner violently refused several orders to get out of the car. During this brief and intense moment, Officer Zimmer was compelled to unholster her own gun and take aim at the Petitioner until Officer Woodmore and Sgt. Summers were able to remove the Petitioner from the vehicle and confiscate his weapons. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report). No shots were fired and Zimmer reholstered her weapon the moment the situation calmed.

During a subsequent patdown search, the officers recovered a fully loaded .50 caliber pistol, with a bullet in the chamber, from Petitioner's fanny pack. Two loaded magazines were also recovered from the pack. In a holster strapped to the Petitioner's ankle, the officers discovered a fully loaded 9 mm firearm, which also had a bullet in the chamber. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report, and Exh 4, Summer's Police Report).

Petitioner was arrested for Carrying a Concealed Weapon and Failing to Obey a Police Officer's Order. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report). He was ticketed for several traffic offenses as well. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 5, Ticket No. 294921). Additionally, the officers confirmed that Petitioner was wanted on a City of Lansing warrant for unpaid parking tickets. During an inventory search of the automobile, the officers located Petitioner's concealed weapons permit. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 6, CCW permit). The permit restricted Petitioner's privilege of carrying the concealed weapons to doing so only in the course of his business with his employer, Engineering Technology Research, Inc. (*Id.*)

The officers also discovered multiple employee identification cards purportedly certifying Petitioner as an employee of the DNR and Detroit Edison. (*Id.*) Petitioner refused to clarify the issue of his employment, or even to indicate whether he was working at the time of the traffic stop, as required by his CCW permit. RE

63, Defendant's Counter-Motion for Summary Judgment, Exh 2, Zimmer's Police Report, and Exh 4, Summer's Police Report). Sgt. Summers was unable to contact Engineering Technology Research by telephone, or locate the business at its purported business address in Livonia. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 4, Summer's Police Report)

Although the police were unable to confirm that Petitioner was compliant with his permit's restrictions at the time of the traffic stop, the Oakland County Prosecutor declined to authorize a criminal complaint for Carrying a Concealed Weapon. Nevertheless, a complaint and warrant were issued for Interference with Police Authority. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 7, Complaint and Warrant). Petitioner was found guilty of the charge following a May 18, 1997, jury trial and was sentenced to ten days in jail and $200.00 in fines and costs. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 8, Misdemeanor Register of Actions). Additionally, on July 25, 1996, after an informal hearing, Petitioner was found responsible for the traffic violations and ordered to pay $105.00 in fines and costs. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 5, Traffic Citation). This finding was affirmed in a September 26, 1996, formal hearing. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 9, Misdemeanor Register of Actions).

The November 20, 1997 Incident

A year and seven months later, at approximately 6:00 p.m. on Thursday, November 20, 1997, Farmington Hills Police Officers Newcomb and Nichols observed Petitioner's vehicle traveling southbound on Orchard Lake Road in the City of Farmington Hills. The vehicle's license plate was illegally displayed in the rear window, such that it was partially obscured by the third taillight. (RE 63, Defendant's Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report and Exh 11, Nichols' Police Report). Petitioner improperly asserts that he was stopped for having an *illegal* plate. (*See* Petitioner's Motion for Summary Judgment,

¶ 1). In reality, Petitioner was stopped for improper attachment of his plate, in violation of M.C.L. 257.255; M.S.A. 9.1955, which requires that the registration plate be "securely fastened" to the rear of the vehicle, "at a height of not less than 12 inches from the ground", and "free from foreign materials that obscure or partially obscure the registration information."

As the officers stopped the vehicle for the improperly displayed plate, they ran a check on what they believed to be the number on the obscured plate. The plate number which the officers ran was not registered with the Secretary of State. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report and Exh 11, Nichols' Police Report). Due to the obstructed view of the plate, the officers believed its number to be 3889FJ. In actuality, the plate, number 3889EJ, was properly registered and valid.

During this traffic stop, as with the April 13, 1996, traffic stop, Petitioner was insistent and uncooperative. He immediately demanded to know why he was stopped. Upon the officers' request, Petitioner produced the registration for the vehicle and an Ohio driver's license, listing his home address as 1064 N. Main Street, Bowling Green, Ohio. A check of the Law Enforcement Information Network (LEIN), showed that the Michigan Secretary of State had *suspended* Petitioner's Michigan driver's license *five* times, all of which were in effect on November 20, 1997, the day of his arrest. Petitioner claimed that, despite the suspension of his Michigan driver's license, he was entitled to drive in this state with his Ohio driver's license. Petitioner further told the officers that he was resident of the State of Ohio.[2] (RE 63 Defendant's

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2. According to the laws of the State of Ohio, Petitioner was ineligible for the Ohio's driver's license, both because his driving privileges were suspended in Michigan, and because he did not, in actuality, reside in Ohio. OH ST § 4507.06 and 4507.08. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing).

Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report and Exh. 11, Nichols' Police Report).

Notwithstanding, Petitioner was arrested for driving with a suspended Michigan driver's license and taken into custody. M.C.L. 257.904; M.S.A. 9.2604, provides:

> (1) *A person whose operator's or chauffeur's license* or registration certificate *has been suspended or revoked* and who has been notified as provided in section 212 of that suspension or revocation, who application for license has been denied, or who has never applied for a license, *shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles*, including an area designated for the parking of motor vehicles, within this state.

When asked if he had any weapons, Petitioner coyly responded, "Not on me". An inventory search of the vehicle revealed a semi-automatic handgun wrapped in a rag, located under the driver's seat. This weapon was fully loaded, with a round in the chamber. The officers also recovered from the vehicle three ammunition magazines, and a second loaded semi-automatic handgun. Petitioner claimed that he had a valid concealed weapons permit, but had left at home. Yet, M.C.L. 28.426(6); M.S.A. 750.229 requires a CCW "licensee [to] carry the license upon his or her person . . . when carrying the pistol . . . in a vehicle . . . The licensee shall display the license upon the request of a peace officer."

In actuality, Petitioner's concealed weapon license had been suspended on an interim basis by the Wayne County Concealed Weapons Licensing Board (Gun Board), after Petitioner failed to appear for an investigatory hearing in May of 1997. The May 1997 hearing had been scheduled in order to investigate the suspicious circumstances surrounding Petitioner's use of his concealed weapons permit at the time of his April 13, 1996, arrest.

Petitioner did appear for a hearing before the Concealed Weapons Licensing Board in November or December of 1997, following his November 20, 1997, arrest. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing). At that time, Petitioner claimed that he did not receive notice of the May 1997 Hearing because the post office refused to deliver mail to his home address, 1502 Harding, Detroit[3], until he rebuilt the front porch which was destroyed in an infamous 1997 tornado. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, pp. 1-12). However, a tornado which hit Detroit, Hamtramck and Highland Park on July 2, 1997, several weeks *after* the May 1997 Gun Board Hearing for which Petitioner declined to appear. Moreover, during the course of the November or December 1997 Hearing, Petitioner admitted that at the time of his November 20, 1997, traffic stop, his license plate was not properly displayed. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, pp. 26-27). Petitioner also admitted that he was not carrying his concealed weapons permit with him on November 20, 1997, as required by law. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons

3. At the gun board hearing which was held in November or December of 1997, Petitioner denied that he was an Ohio resident, contrary to his assertions at the time of the November 20, 1997 arrest. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report, Exh 11, Nichols' Police Report and Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, pp. 1-2, 8-9). Thus, his Ohio's driver's license was invalid. *See* note 4, *supra*. At this hearing, Petitioner also misrepresented the sequence of events surrounding the April 13, 1996, arrest, which were memorialized in the videotape attached hereto as Exh 3. *See also* RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, pp. 19-23.

Licensing Board Hearing, p. 10). As a result of the November or December 1997 Gun Board Hearing, Petitioner's concealed weapons permit was *permanently* revoked. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, pp. 29-30).

While en route to the Farmington Hills Police Station on November 20, 1997, Petitioner told Officer Newcomb that he was a diabetic and in need of his afternoon insulin. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report). When they arrived at the station, Petitioner was examined by paramedics and transported to Botsford Hospital for treatment of abdominal pain. (*Id.*; RE 63, Exh 13, Botsford Hospital aftercare instructions, RE 78, 79 Videotape). Petitioner was released from the hospital at approximately 8:30 p.m. and returned to the Farmington Hills Police Department where he was booked and lodged without apparent incident. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 13, Botsford Hospital aftercare instructions, and Exh 10, Newcomb's Police Report). Petitioner's Medical History Screening Questionnaire, completed at 9:20 p.m. on November 20, 1997, reflects his diabetic history and treatment and a complaint of wrist pain, but notes no visible injuries or an illness. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 10, Newcomb's Police Report).

At approximately 10:45 p.m., Petitioner complained to the police of coldness and numbing in his legs. He did not complain of increased abdominal pain, but requested a return visit to the hospital for an insulin shot. (RE Defendant's Counter-Motion for Summary Judgment, Exh 14, Burkhart's Police Report). Farmington Hills Police Sergeant Burkhart reviewed Petitioner's aftercare instructions and noted that they advised he return to the hospital only for increased abdominal pain. (RE Defendant's Counter-Motion for Summary Judgment, Exh 14, Burkhart's Police Report, and Exh 13, Botsford Hospital aftercare instructions). Petitioner then requested an extra blanket for his comfort,

indicating that he would be fine and expected to be released soon. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 14, Burkhart's Police Report).

Petitioner was released without bond, pending further investigation, at approximately 11:30 a.m. on November 21, 1997, after just 7½ hours in custody.[4] (RE 78-79, videotape; RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 3, Lt. Brown's Police Report; Exh 14, Burkhart's Police Report; and Exh 15, Arrest Record/Prisoner Tracking showing date and time of release). Despite Petitioner's present allegations of "hyperglycemic pain" and "diabetic seizures", this videotape of Petitioner's release shows that he was released in fine health, laughing and joking with the officers processing his release. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 1, Plaintiff's Complaint; and Exh 3, Lt. Brown's Police Report; RE 52 Petitioner's Motion for Summary Judgment, ¶¶ 4, 7, 13-14, and Exh K). Petitioner was *never* able to produce a valid CCW permit. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 14, Burkhart's Police Report). Although Petitioner claimed that the alleged failure to provide medical treatment resulted in diabetic seizures, he has presented no medical evidence that such is true. The letter from Petitioner's endocrinologist, which is attached to Petitioner's Motion for Summary Judgment as Exh K, failed to indicate that Petitioner experienced the onset of seizures after his November 20, 1997, arrest.

Thereafter, the Oakland County Prosecutor authorized a complaint and warrant against the Petitioner, charging him with Carrying a Concealed Weapon and Driving While License Suspended. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 16, Complaint and Warrant charging Weapons - Carrying Concealed; and Operating - License Suspended, Revoked,

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4. This is contrary to Petitioner's Complaint, wherein he claimed he suffered 9 hours of incarceration. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 1, Plaintiff's Complaint).

Denied/Allowing a Suspended Person to Operate). On January 26, 1998, following a preliminary examination, Petitioner was bound over to the Oakland County Circuit Court to stand trial on both charges. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 17, Bindover Order). Trial was scheduled for June 22, 1998.

B. Trial Court Proceedings.

In the meantime, on or about November 25, 1997, just five days after his most recent arrest, Petitioner filed the present cause of action, against the City of Farmington Hills and the Farmington Hills Police Department, alleging violations of his rights under the Sixth, Eighth and Tenth Amendments of the United States Constitution. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 1, Plaintiff's Complaint).

Plaintiff entered a default against the Defendant, Farmington Hills Police Department. A Motion to Set Aside the Default was entered immediately. It was granted by the trial court. (RE 20, Order Setting Aside Default).

On or about May 26, 1998, Petitioner filed a Motion for Summary Judgment, seeking summary resolution of his claims, together with damages in the amount of $10,000,000. (RE 52 Plaintiff's Motion for Summary Judgment). However, for the reasons set forth more fully below, Petitioner's cause of action was utterly devoid of factual or legal merit. Defendants then filed their Counter-Motion for Summary Judgment, seeking dismissal of Petitioner's claims against them, in their entirety, with prejudice, and request an award of costs, including reasonable attorneys fees, necessitated by their defense of this spurious action. (RE 63 Defendant's Counter-Motion for Summary Judgment).

C. Appellate Proceedings.

Petitioner filed a Notice of Claim of Appeal to the Sixth Circuit Court of Appeals from the Order Setting Aside the Default that Petitioner had entered against the Police Department only on February 2, 1998. (RE 20 Order Setting Aside Default). Although

a Briefing Schedule was sent out by the Court on March 9, 1998, Defendants filed a Motion to Dismiss asserting a lack of jurisdiction in the appellate court because the Petitioner was appealing an Order Setting Aside a Default. This appeal was not ripe because the lower court matter had not reached a final judgment in the case. Since the Petitioner was not appealing from the final order of the District Court, then the appellate court did not have jurisdiction. The Court of Appeals held the Briefing in abeyance while the Motion was pending until it granted the Motion and Order dismissing the appeal for lack of jurisdiction by an Order entered on April 22, 1998. (RE 93 Opinion and Order entered 8/11/98). Notwithstanding his untimely Motion for Rehearing, Petitioner filed this Petition to the United States Supreme Court. Subsequently, he filed a Notice of Claim of Appeal from the final order, Docket No. 98-1936, and has filed his Brief on Appeal in that case with the Sixth Circuit Court of Appeal.

REASONS FOR DENYING THE WRIT

I. THE APPELLATE COURT PROPERLY GRANTED A DISMISSAL BASED ON THE LACK OF JURISDICTION FOR THE REASON THAT THE PETITIONER DID NOT APPEAL FROM THE FINAL ORDER.

Appellate jurisdiction is found at 28 U.S.C. § 1291:

> **1291. Final decisions of district courts**
>
> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals *from all final decisions* of the district courts of the United States . . . (Emphasis added).

This Petition is taken from the Appellate Court's dismissal of Petitioner's Appeal for lack of jurisdiction because Petitioner incorrectly filed a Notice of Claim of Appeal from the Order Setting Aside the Default mistakenly entered against the Police Department. A final order is defined as an order which "terminates

all issues presented in the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined." *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 543 (6 CA 1986).

Simply, an Order Setting Aside a Default is not a final judgment for purposes of appealability. *Kummer v. United States*, 140 F.2d 191, 192-93 (5 CA 1945). Petitioner provided no legal authorities that states otherwise. Instead, Petitioner incorrectly relies on the cases that consider the setting aside of the default in appeals that had properly invoked appellate court jurisdiction. Petitioner's very own pleadings to this Court provided a copy of the final decision that was entered on August 11, 1998, after this appeal had been filed. Unquestionably, the appellate court did not nave jurisdiction over the first appeal.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THE TRIAL PROPERLY GRANTED THE MOTION TO SET ASIDE A DEFAULT.

A default can be set aside by a trial court upon a showing of good cause by the defaulted party. Fed. R. Civ. P. 55(c). In deciding whether to set aside a default, the court considers three factors: (1) whether a meritorious defense has been presented in support of Defendant's motion; (2) whether granting of the motion would prejudice the Petitioner; and (3) whether the Defendants' failure to plead was due to excusable neglect or mistake. *Shepard Claims Service v. William Darrah & Associates*, 796 F.2d 190 (CA 6, 1986); *Bieros v. Nicola*, 851 F. Supp. 681 (E.D. Pa. 1994). As the court in *Shepard* has stated:

> . . . When the first two factors militate in favor of setting aside the entry [of default], it is an abuse of discretion for a district court to deny a Rule 55(c) in the absence of a wilful failure of the moving party to appear and plead. 796 F.2d at p. 194.

In this case, the Farmington Hills Police Department has a meritorious defense to any claim brought by the Petitioner.

Furthermore, the courts have found that miscommunication between counsel and a party, or inadvertence in properly forwarding a complaint through channels to counsel constitutes excusable neglect, and cannot form a basis for a default. *Bieros, supra*. In this case, defense counsel was informed that service of process was effected on December 2, 1997. If that information were true, Respondents' Answer was timely filed. For that reason, the trial court did not abuse its discretion in setting aside the default. Petitioner clearly was not prejudiced in that one is not prejudiced in losing something that they never had available because Petitioner could not bring a lawsuit against the Police Department. In fact, Petitioner continued this frivolous action against the remainder of the municipal Defendants.

III. THIS COURT SHOULD DENY THE PETITION BECAUSE THE TRIAL COURT PROPERLY CONCLUDED THAT THE FARMINGTON HILLS POLICE DEPARTMENT IS NOT AN ENTITY SUBJECT TO SUIT AND SUMMARY JUDGMENT FOR THAT PARTY WAS PROPER.

The legal rule that a Police Department is not a legal entity which is subject to suit under state or federal law has long been established. *Moomey v. City of Holland*, 490 F. Supp. 188, 190 (W.D. Mich. 1980); *McPherson v. Fitzpatrick*, 63 Mich. App. 461, 464, 234 N.W. 2d 566 (1975). Consequently, the Farmington Hills Police Department had an absolute legal defense to all of Petitioner's claims in this case. The trial court agreed, see its opinion, n.5.

IV. THIS COURT SHOULD DENY THE PETITION BECAUSE THE TRIAL COURT PROPERLY CONCLUDED THAT NO CONSTITUTIONAL VIOLATION HAD OCCURRED AND THE PETITIONER'S ARREST WAS BASED ON PROBABLE CAUSE.

Procedurally or substantively, this matter was properly dismissed. Petitioner's claims purportedly arise out of the Sixth, Eighth and Tenth Amendments to the United States Constitution. (Exh 1). His Complaint, however, neglected to specify any legislation such as 42 U.S.C. § 1983 that permits him to proceed in a private cause of action for violation of these constitutional rights. Thus, summary judgment for Respondents would have been proper on that basis.

A. Petitioner failed to establish any unconstitutional policy.

The City is not liable because Petitioner failed to show the municipal entity, through a recognized custom, policy or practice caused the deprivation of constitutionally protected rights. *Monell v. Dept of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). A municipality cannot be held liable on a theory of *respondeat superior* for the alleged torts of its employees. *Monell, supra*; *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985). This policy can be shown only through a course of unconstitutional conduct that is so permanent and well settled as to virtually constitute law. *Barcume v. City of Flint*, 819 F. Supp. 631 (E.D. Mich. 1993); *Hilliard v. Walker's Party Store*, 903 F. Supp. 1162 (E.D. Mich. 1995). Evidence of isolated incidents of unconstitutional activity do not suffice. *Oklahoma City, supra*. In fact, even if a municipal "policy" leads to police misconduct, it is insufficient to satisfy the *Monell* requirements for municipal liability; the Petitioner must show that the particular policy was the "moving force" behind a constitutional violation. *Id.* A civil rights litigant must establish the necessary causal link between the municipality as a defendant, and the deprivation of constitutionally-protected rights. *Id.*

Here, Petitioner failed to either plead or prove the existence of a custom or policy depriving citizens of their civil rights, which is so permanent and well settled in the City of Farmington Hills as to virtually constitute law. Instead, Respondent attempted to show a pattern of discrimination through reference to other proceedings, all of which were decided in favor of the entity and held that *the City of Farmington Hills, or its Police Department, had not engaged in a custom or practice of depriving persons of their civil rights. Ziegler v. City of Farmington Hills Police Department*, 902 F.2d 36 (1990) (Exh 18); *Willing v. City of Farmington Hills*, 159 Mich. App. 366, 406 N.W. 2d 298 (1987); and State of Michigan Dept of Civil Rights Notice of Disposition Regarding Complaint Filed by Perrion L. Robbins v. Farmington Hills Police Department (Exh 19). (RE 93, Opinion and Order, 7-8). The trial court agreed with Respondent's argument.

Simply, Petitioner failed to provide any evidence of an unconstitutional policy. Consequently, the trial court properly granted summary judgment in favor of Respondents. Judgment can be affirmed on this basis.

B. No constitutional violation occurred.

Furthermore, if no constitutional deprivation is suffered, then there can be no liability on the part of the governmental body. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986); *Spears v. City of Louisville*, 27 F.3d 567 (6 CA 1994).

Petitioner's claims failed because he was unable to show that he was deprived of rights secured by the United States Constitution. *Heller, supra*; *Spears, supra*. Petitioner has alleged that he was subject to an illegal traffic stop in violation of his Sixth Amendment right to be free from unreasonable searches and seizures; his Eighth Amendment right to a speedy trial; and the Tenth Amendment right to be free from cruel and unusual punishment. (Exh 1, ¶3). However, there is no Sixth Amendment prohibition against

unreasonable searches and seizures; no Eighth Amendment right to a speedy trial; and no Tenth Amendment prohibition against "cruel and unusual punishment. His claims must fail because no deprivation of any right secured by the Sixth, Eighth or Tenth Amendments was shown to be violated.

1. Probable Cause Supported Each Arrest.

Both of Petitioner's arrests were supported by probable cause. Petitioner was, in fact, convicted by a jury for the charges arising out of the April 13, 1996 stop. Secondly, he was bound over following a preliminary exam on the charges arising out of his November 20, 1997 arrest. Therefore, independent voices concluded that the officers acted with probable cause. Petitioner's claim must fail for that reason alone. *Criss v. City of Kent*, 867 F.2d 259 (6 CA 1988).

Likewise, Petitioner's allegations of assault, occasioned by application of handcuffs when he was taken into custody, are contradicted by the facts themselves. It is well settled that where, as here, an officer is making a lawful arrest, the failure to loosen tight handcuffs does not rise to the level of a constitutional violation. *Ford v. Gruwell*, 961 F.2d 219 (10 CA 1992); *Darnell v. Phillips*, 419 F.2d 247 (4 CA 1990); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1067 (8 CA 1990); and *Swanson v. Fields*, 814 F. Supp. 1007 (D. Kan. 1993).

"[A]ll claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' test." *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6 CA 1996) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989). This test, like the test for qualified immunity,

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the

> officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396. The "reasonableness" of an officer's use of force is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

Petitioner has attempted to be more specific on his various Briefs on Appeals to the various federal, appellate levels. Notwithstanding, Petitioner fails to comprehend the illogical nature of his arguments. He refuses to understand that his arrest was proper as shown by his convictions and the undeniable fact that his license was suspended at the time he arrived in Michigan.

The charges in the second arrest were supported by probable cause. Petitioner's license plate was incontrovertibly, improperly displayed under M.C.L.A. 257.255; M.S.A. 9.1955, which states:

> (1) Except as otherwise provided in this chapter, a person shall not operate, nor shall an owner knowingly permit to be operated, upon any highway, a vehicle required to be registered under this act unless there is attached to and displayed on the vehicle, as required under this act unless there is attached to and displayed on the vehicle, as required by this chapter, a valid registration plate issued for the vehicle by the department for the current registration year. A registration plate shall not be required upon any wrecked or disabled vehicle, or vehicle destined for repair or junking, which is being transported or drawn upon a highway by a wrecker or a registered motor vehicle.

After being stopped, it was discovered he was driving in Michigan with a suspended license. The City did *not* suspend his license, only the Secretary of State can suspend a license. M.C.L. 257.319-321(b); M.S.A. 9.2019. Police officers have

no choice but to arrest for a driving on a suspended license because they cannot issue a ticket and permit the individual to drive away. Moreover, the fact Petitioner obtained a valid Ohio license has no bearing on his conviction for driving in Michigan on a suspended Michigan license. *People v. Glantz*, 124 Mich. App. 531, 335 N.W. 2d 80 (1983); *People v. James*, 36 Mich. App. 550, 194 N.W. 2d 57 (1971).

Because the LEIN showed that Petitioner did have a suspended Michigan License, he was properly arrested. Individuals cannot avoid the deterrent of "suspension" of their license by merely going to an adjacent state and obtaining a license under false or suspect pretenses in order to avoid the State of Michigan's penalties for failing to follow the law. Most importantly, Michigan does not recognize an exception to the illegality of driving with a suspended license when a valid license from another state is obtained. Under any circumstance, his Michigan license was suspended and his arrest was proper.

Moreover, Petitioner's gun permit showed that he was a resident of Detroit. Yet, he carried an Ohio driver's license based upon his alleged "business" residence in Ohio. Petitioner cannot have it both ways and reside in two different places. Even if Petitioner asserts that he is an Ohio resident, then his gun permit was ineffective and inaccurate because it was issued by Wayne County. (It was ultimately revoked by Wayne County.)

Petitioner's arrest based on the concealed weapons charge was a valid arrest. Guns were found at the time officers were inspecting the vehicle pursuant to the abandonment statute, M.C.L. 257.252(d); M.S.A. 9.1952, and his arrest. Undisputedly, his gun permit was not on his person. Secondly, it had been revoked, first when he failed to show for the hearing, and subsequently at the actual hearing. He simply had no valid gun permit in any place at this time. M.C.L. 28.426(6); M.S.A. 28.93 provides:

> The licensee shall carry the license upon his or her person when carrying a pistol concealed upon his

> or her person or when carrying the pistol, whether or not concealed, in a vehicle occupied by the licensee. The licensee shall display the license upon the request of a peace officer.

Lastly, Petitioner's constitutional rights after the proper arrest were shown *not* to be violated. Even a cursory review of the videotape evidence and the sworn reports of the various officers involved demonstrates that the Petitioner never encountered unreasonable force. *Graham v. Connor, supra*. Plaintiff's "speedy trial" claim is utterly devoid of merit. *United States v. Ciammitti*, 720 F.2d 927 (6 CA 1983), *cert. denied*, 466 U.S. 970. Respondent incorporates by reference the argument stating that Petitioner's denial of medical treatment is also without merit.

On appeal, Petitioner now asserts that M.C.L. 257.321a; M.S.A. 9.2021(1) is unconstitutional. This defense should have been raised at the time of his criminal proceedings. If it was raised, the state district court must have found it to be without merit. On its face, the statute is constitutional because it clearly provides for suspension of a license *if* a person fails to answer a citation or fails to appear in court. Neutral on its face, this provision is neither overbroad nor vague. Furthermore, it applies equally to all individuals. It provides for a 28-day notice after the determination of noncompliance is made and an opportunity to appeal by way of a Petition to the circuit court. M.C.L. 257.323; M.S.A. 9.2023.

Moreover, the impoundment statute was properly invoked in this instance where Petitioner was being arrested. Under M.C.L. 257.252(d); M.S.A.1.1952(4), an automobile of a person being arrested must be impounded for safe keeping and, in this instance where allegedly unauthorized weapons were discovered, necessary. In *Auto Club Ins Assn v. Farmington Hills*, 220 Mich. App. 92, 559 N.W. 2d 314 (1997), the court concluded that the cost and fees for 2 years of storage would be paid by the individual arrested and that the failure to provide written notice was not a violation of the statute in that the person had actual notice of the impoundment because he was present when he was arrested and was informed

of the impoundment. Abandoned automobiles cannot be left alongside public roads as possible obstructions for an indefinite period. Here, Petitioner had no valid license and was not permitted to drive so that he would not have been able to remove it himself. Under either subsection (a) or (b), this vehicle was properly impounded because once Petitioner was arrested, the vehicle was abandoned.

In his Complaint, Petitioner maintained that he has been subjected to repeated police harassment. Yet, in his statements before the Wayne County Concealed Weapons Licensing Board, Petitioner states that he has had only two previous contacts with the Farmington Hills Police Department. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 12, Transcript of Wayne County Concealed Weapons Licensing Board hearing, at p. 24). He admitted that he has been treated fairly during the prior contacts and did not receive a traffic citation. (*Id.*) Clearly, these two prior contacts, during which Petitioner was fairly treated, belie Petitioner's claims of harassment. His alleged statistical evidence is neither substantiated nor supportive of this claim. The statistics do not prove that the arrests were improper in these instances. Otherwise, based upon his theory, no African American could be arrested at all.

In conclusion, Defendant City of Farmington Hills cannot be found liable for these merit less constitutional claims because the arrests were proper, the search was legal, and no excessive force was evidenced.

V. THIS COURT SHOULD DENY THE PETITION BECAUSE THE ISSUE OF CONSTITUTIONALITY WAS NOT RAISED BELOW, AND FURTHERMORE THE STATE ABANDONMENT STATUTE IS CONSTITUTIONAL.

Petitioner attempts to argue that M.C.L. 257.252(d); M.S.A. 9.1952(4) is unconstitutional, but failed to set forth authority or argument.[5] M.C.L. § 257.252(d); M.S.A. § 9.1952(4) provides:

> (1) A police agency or a governmental agency designated by the police agency may provide for the immediate removal of a vehicle from public or private property to a place of safekeeping at the expense of the registered owner of the vehicle in any of the following circumstances:
>
> (a) If the vehicle is in such a condition that the continued operation of the vehicle upon the highway would constitute an immediate hazard to the public.
>
> (b) If the vehicle is parked or standing upon the highway in such a manner as to create an immediate public hazard or an obstruction of traffic.
>
> * * *
>
> (e) If the vehicle must be seized to preserve evidence of a crime, or when there is reasonable cause to believe that the vehicle was used in the commission of a crime.
>
> * * *
>
> (g) If the vehicle is hampering the use of private property by the owner or person in charge of that property or is parked in a manner which impedes the movement of another vehicle.

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5. Moreover, even if the Petitioner was arrested under a statute that is later determined to be unconstitutional, no cause of action exists. *Michigan v. DeFillippo*, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).

Here, Plaintiff's vehicle could not be permitted to remain unattended indefinitely alongside a public road.

> Here, the police officers properly removed the vehicle from the scene of the accident "to a place of safekeeping at the expense of the registered owner of the vehicle" pursuant to § 252d(1)(e). This provision makes the vehicle owner responsible for the costs of removal and safekeeping. Because petitioner became the owner of the vehicle, it is responsible for towing and storage costs under § 252d(1)(e). Petitioner argues that § 252d(1)(e) makes owners responsible only for short-term storage until they redeem their vehicles. However, the statute clearly addresses situations where a vehicle is impounded in connection with a criminal prosecution. Criminal prosecutions are frequently not completed until many months or even years after the incidents giving rise to them. Accordingly, in the absence of language limiting the time frame of such "safekeeping," we assume that the Legislature contemplated that vehicles might be stored for extended periods pursuant to § 252d(1)(e). requirements of § 252d. *Auto Club Ins Assn v. Farmington Hills*, 220 Mich. App. 92, 96-97, 559 N.W.2d 314 (1996).

Unquestionably, Petitioner was properly arrested as a consequence of a suspended license and concealed weapons that were found in the car. Moreover, the car could not be left without a driver to remove the vehicle from the public premises and for safekeeping reasons. The procedures under the statute were followed and adequate notice was provided because Petitioner was present at the time. The constitutionality of the statute was not considered in *Auto Club*, *supra*, but again it is neither overbroad or vague and provides for notice and post-deprivation hearing and rights. Thus, it is not unconstitutional and was not unconstitutionally applied.

VI. THIS COURT SHOULD DENY THE PETITION BECAUSE PETITIONER'S DENIAL OF MEDICAL TREATMENT IS ALSO FRIVOLOUS WHERE VIDEOTAPES AND RECORDS SHOW THAT PETITIONER WAS PROVIDED WITH MEDICAL TREATMENT.

Respondent adopts by reference all the factual evidence provided to the court herein to show this Court that Petitioner's assertions are, in fact, total misrepresentations of what occurred. Petitioner *was* taken to Botsford Hospital where he received treatment. (RE 63 Defendant's Counter-Motion for Summary Judgment, Exh 13, Botsford Hospital aftercare instructions). Thus, any medical condition could have been and would have been provided at the hospital. Any serious medical need would have been addressed.

In his Complaint, Petitioner suggests that he was hospitalized because of an injury to his wrist occasioned by Defendants' use of handcuffs. (Exh 1, ¶3). However, Petitioner's aftercare instructions from Botsford Hospital indicate that he was treated for abdominal pain, rather than an injury to his wrist. (Exh 13). Moreover, although Petitioner complained of wrist pain at the time his medical history screening questionnaire was completed, the document indicates an absence of injury. (Exh 10).

The trial court stated as follows:

> On the way to the station, [Petitioner] advised the officers that he was a diabetic and that he needed insulin. [Petitioner] was transported to the hospital, where he received treatment and was then taken to the station at approximately 8:37 p.m. At approximately 10:45 p.m., [Petitioner] told Sergeant Robert Burkhart that he felt cold and numb and that he needed to return to the hospital for an insulin shot. Burkhart indicated on his report that the hospital paperwork indicated abdominal pain and did not mention a diabetic

> condition. According to Burkhart's report, [Petitioner] indicated that he would be fine if he were provided with an extra blanket and soon released. [Petitioner] was released at 1:30 a.m. on November 21, 1997.
>
> [Petitioner] acknowledges that he was treated for pain related to his diabetes at the hospital and that the doctor told him that if the pain returned, he should return to the hospital. [Petitioner] claims that the police officers ignored his requests to return to the hospital.

Although Petitioner claims that the alleged failure to provide medical treatment resulted in diabetic seizures, he presented no medical evidence to support his claim. The letter from Petitioner's endocrinologist, which was attached to Petitioner's Motion for Summary Judgment as Exh K, failed to indicate that Petitioner experienced the onset of seizures after his November 20, 1997, arrest. The jail records failed to so indicate. The video tape reveals a healthy, often jovial Petitioner. Furthermore, the Petitioner was at the hospital and could have mentioned or requested treatment for that condition. On the contrary, all of the evidence indicated that Petitioner received all necessary medical treatment, thus defeating his cruel and unusual punishment claim. *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). A mere delay in medical treatment is not a constitutional violation. *Tyler v. Rapene*, 603 F. Supp. 268 (DC Pa. 1985); *Gandreault v. Mun. Of Salem, Mass.*, 923 F.2d 203 (1 CA 1990), *cert. denied*, 500 U.S. 956 (1991).

CONCLUSION

Simply, Petitioner's claims of constitutional deprivation are not supported by the law or the facts. This Court should and can deny the Petition for any of the reasons submitted to the Court by Respondent.

Respectfully submitted,

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